STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JONATHAN DAVID HEWITT,

Defendant-Appellant.
_____/

Supreme Court No. 155239

Court of Appeals No. 332946

Lower Court No. 10-2907-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee
_____

CHARI K. GROVE (P25812)
Attorney for Defendant-Appellant
_____

SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

BY: **CHARI K. GROVE (P25812)**
Assistant Defender
State Appellate Defender Office
Suite 3300 Penobscot
645 Griswold
Detroit, MI 48226

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on June 4, 2010. A Claim of Appeal was filed by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated June 29, 2010, as authorized by MCR 6.425(F)(3). The Michigan Court of Appeals affirmed his convictions, and the Supreme Court denied leave to appeal. Appellant filed a motion for relief from judgment which was granted by the trial court. The prosecutor appealed and the Court of Appeals reversed the trial court's decision. Appellant applied for leave to this Court, and on September 29, 2017, this Court ordered additional briefing.

STATEMENT OF QUESTIONS PRESENTED

I. MR. HEWITT-EL'S GROUNDS FOR RELIEF WERE NOT DECIDED AGAINST HIM ON DIRECT APPEAL.

Court of Appeals answers, "Yes and No".

Defendant-Appellant answers, "Yes".

II. THE COURT OF APPEALS FAILED TO DEFER TO THE WAYNE CIRCUIT COURT'S CREDIBILITY DETERMINATIONS.

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

III. MR. HEWITT-EL HAS ESTABLISHED ENTITLEMENT TO RELIEF UNDER MCR 6.508(D).

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Mr. Hewitt-El generally adopts the recitation of facts contained in the Application for Leave to Appeal (in the Statement of Facts and the Issue presented), with additional facts in the issues that follow.

I. MR. HEWITT-EL'S GROUNDS FOR RELIEF WERE NOT DECIDED AGAINST HIM ON DIRECT APPEAL.

Standard of Review

Questions of law are reviewed de novo. *Kaiser v Allen*, 480 Mich 31, 35 (2008).

The Grounds for Relief Are Not the Same

This Court has ordered briefing by appellant on the question of whether "the defendant's alleged grounds for relief were decided against him on direct appeal." This Court has not set forth a test for determining what "grounds for relief" means in the context of MCR 6.508(D). This Court, however, has previously rejected the proposition that federal habeas corpus jurisprudence should play "only a limited role in defining the standards imposed by MCR 6.508." *People v Reed*, 449 Mich 375 (1995). MCR 6.508 was modelled after the federal habeas corpus law as it had developed until 1989. *Id*.; see also *People v Jackson*, 465 Mich 390, 398 (1971) (the portion of the rule requiring a showing of good cause for failure to raise the issue on direct appeal and prejudice are "derived" from U.S. Supreme Court decisions in federal habeas corpus cases.) "MCR 6.508(D) is identical to the federal standards for habeas corpus relief under 28 USC § 2255." *Id*. at 380. This Court has noted that MCR 6.508 (D)(2) "draws" from the doctrines of res judicata and law of the case. *Jackson*, 465 Mich at 398. The answer, then, to the question to what is a "ground for relief" must be informed both by (1) federal law relating to habeas petitions as it existed before the current iteration of the habeas corpus statute (AEDPA), which was not adopted until 1996; and (2) the common law principles of res judicata and law of the case.[1]

[1] The doctrines of res judicata and collateral estoppel, which bar relitigation in a *separate* proceeding of all issues that were or could have been decided in the context of the main action, are inapplicable because this case does not involve a separate action but rather a motion for relief from judgment. *People v Herrera*, 204 Mich App 333, 339-41 (1994) The applicable doctrine would be the law of the case.

At common law, res judicata did not apply to the denial of habeas relief. *McClesky v Zant*, 499 US 467, 479 (1991). In *Sanders v. United States*, 373 US 1, 8 (1963), the Court stated that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Res judicata affirmatively did not apply, under either the common law or § 2255. *Id.* at 14. Eventually, as appellate review became available, the courts developed a standard of "abuse of the writ" to apply to successive applications. *McClesky*, 499 US at 480-481.

In *Sanders*, the United States Supreme Court set forth some "basic rules" to guide the lower courts in their review of *successive* motions under 28 USC § 2255 and applications for federal habeas corpus. 373 US at 15. The Court held that "controlling" weight could be given to the prior denial "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*

Continuing to define ground, the Court said:

> By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects, *Id.* at 16

Crucially, doubts as to whether two grounds are different or the same, "should be resolved in favor of the applicant." *Id.*

Furthermore, under this rule, even if the same grounds were presented, to be conclusive the prior denial "must have rested on an adjudication of the merits of the ground presented in the subsequent application." *Id.* Furthermore, the applicant could still avoid the "controlling weight" rule by showing that the "ends of justice" would be served by a redetermination of the ground.

Applying the general principles espoused in *Sanders*, the grounds for relief raised in the 6.500 motion were not the same as those in the direct appeal. The issues raised[2] in the direct appeal (according to the table of contents) were:

The first ground for relief was that the trial court abused its discretion in denying the motion for substitute counsel, which the defendant sought for a number of reasons including a dispute about calling alibi witnesses. The Court of Appeals applied the law relevant to the issue of substitute counsel requests, as raised by defense counsel. The Court of Appeals did *not* address the issue of whether trial counsel was ineffective for failing to investigate and present witnesses or for failing to present a substantial defense, nor did the Court of Appeals cite or discuss any law on ineffective assistance of counsel in addressing this issue. In rejecting the

[2] Defined as "simply a sufficient legal basis for granting the relief sought by the applicant." *Sanders v United States*, 373 US 1 (1963).

"right to substitution" issue, the Court merely cited, among other reasons, Mr. Hewitt-El's failure to prove what the alleged alibi witnesses would have said and how they would have helped his defense.[3] (Appx. 28a-32a). The Court of Appeals in the appeal of right did *not* hold that there was no prejudice in trial counsel's failure to present witnesses on Mr. Hewitt-El's behalf (the second half of the *Strickland* analysis). That would have been impossible; the Court of Appeals did not hear the witnesses' proffered testimony because of ineffective assistance of trial counsel and ineffectiveness of appellate counsel. (Appx. 30a).

The second ground for relief was that defense counsel had failed to *object* to the admission of the specifics of Mr. Hewitt-El's prior convictions, or failed to request a proper jury instruction on the issue. Appellate counsel mentioned the filing of a motion in limine but, according to the Court of Appeals, counsel "abandoned this claim." (Appx. 31a). Notably, appellate counsel on direct appeal did not provide affidavits from the alibi witnesses, or trial counsel, and did not seek a remand to have additional evidence provided to the Court of Appeals on those issues.

The relevant issues raised in the supplemental brief in the trial court (in 2015), are:

> **I. DEFENDANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL BY HIS ATTORNEYS' FAILURE TO INVESTIGATE AND PRESENT ALIBI AND MEDICAL WITNESSES IN SUPPORT OF HIS DEFENSE AND IN SUPPORT OF HIS APPEAL; DEFENDANT IS ENTITLED TO RELIEF FROM JUDGMENT HAVING SHOWN CAUSE AND PREJUDICE.**

The trial court granted an evidentiary hearing on the issue of ineffective assistance of counsel:

[3] Of course, this was because trial counsel failed to investigate.

> "In this case, and after a thorough review of the record, there is evidence to support a claim of ineffective assistance of trial and appellate counsel. The record reveals instances of trial counsel's failure to provide competent pretrial and trial assistance. Moreover, appellate counsel erred in failing to identify and effectively raise the ineffective assistance of trial counsel claim on appeal. As such, the allegations and evidence presented in this motion are sufficient to warrant an Evidentiary Hearing on the basis of ineffective assistance of trial and appellate counsel under the standards provided for relief pursuant to MCR6.500." (Trial court opinion granting hearing).

In a supplemental motion filed after her appointment, counsel raised this issue (not addressed below):

> **I. THE EVIDENCE OF FELON IN POSSESSION OF A FIREARM IS INSUFFICIENT, DEFENDANT'S CONVICTION MUST BE VACATED, AND HE IS ENTITLED TO A NEW TRIAL OR, MINIMALLY, A RESENTENCING ON THE REMAINING COUNTS; TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO DISMISS THIS COUNT, AND APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE.**

During the hearing on the motion, the testimony and questioning by counsel and the trial court led to a third issue: trial and appellate counsel were ineffective in failing to move for suppression of Mr. Hewitt-El's prior convictions. The trial court granted relief based on all of the above grounds.

Accordingly, the grounds for relief challenged by the People in their appeal from the trial court's decision, and the grounds for relief raised in this Court by Appellant involve Mr. Hewitt-El's claim that: 1) trial counsel was ineffective in failing to investigate and present alibi witnesses; 2) trial counsel was ineffective in failing to investigate and present medical witnesses; 3) trial counsel was ineffective in failing to move for suppression of Mr. Hewitt-El's prior convictions, and 4) the evidence of felon in possession of a firearm is insufficient. In addition, Mr. Hewitt's grounds for relief necessarily include: 5) appellate counsel was ineffective in

failing to raise these issues, providing cause for not raising the issues in the direct appeal; and 6) Mr. Hewitt established actual prejudice from the alleged irregularities. These grounds for relief were neither presented to the Court of Appeals nor decided by the Court of Appeals in the direct appeal.

The Court of Appeals in its second opinion found law of the case with regard to one of the alibi witnesses, Sheila Jackson, merely because trial counsel stated at trial that, in his opinion, she would not have provided an alibi. However, neither the trial court nor the Court of Appeals on direct appeal considered this issue in the context of ineffectiveness assistance of counsel, and neither the trial court nor the Court of Appeals knew what Sheila Jackson would have said. It was revealed at the post-conviction evidentiary hearing that trial counsel had decided not to call Ms. Jackson because she told him she was not home (with Mr. Hewitt-El) between 12:00 and 12:30 p.m. (Appx. 136a). However, the crime occurred between 1:30 and 1:45 p.m. (Appx. 153a), and, according to Mr. Hewitt-El and his son, Ms. Jackson had returned from church by that time. (Appx. 66a). Again, the Court of Appeals addressed the "ground for relief" that the trial court abused its discretion in denying the motion for substitute counsel, *not* an ineffective assistance of counsel "ground for relief."

The Court of Appeals in the present appeal found "defendant's ineffective assistance argument regarding the failure to file a motion to preclude admission of the prior convictions was decided against defendant in the prior appeal." (Appx. 23a). This erroneous finding was based on the prior Court's actual conclusion that an *instruction on the use of impeachment evidence* would not have affected the outcome. However, had the evidence of Mr. Hewitt-El's *several* prior convictions for *armed robbery* in an assault with intent to commit armed robbery case been *suppressed* in the first place, this very likely *would* have affected the outcome, as the

trial court concluded in the opinion granting the motion for relief from judgment. That issue was not addressed in the direct appeal because, again, the Court of Appeals held that appellate counsel abandoned the issue.[4]

Finally, the first ground for relief requires a finding of ineffective assistance by both trial *and* appellate counsel in the failure to investigate and introduce the evidence of the alibi and medical witnesses. The substance of the testimony would be critical to determining whether that failure to investigate and present the evidence was prejudicial. A critical difference from the original ground would be the failure of appellate counsel to raise the issue and provide the evidence the court would need. Calling these grounds identical unnecessarily penalizes defendants, and protects appellate counsel from constitutionally deficient performance. It also runs counter to the *Sanders* caution to resolve doubts in favor of the inmate. *Sanders, supra* at 15. As to the second ground for relief, the failure by trial counsel to file a motion in limine with respect to the prior convictions, and for appellate counsel to pursue the issue, is an issue that the Court of Appeals expressly found to be abandoned by appellate counsel. This ground for relief then, was expressly *not* raised in the earlier appeal. Again, finding otherwise truly protects appellate counsel from deficient performance.

Thus, applying the principles in *Sanders*, the grounds for relief were not previously raised, and so were not decided on direct appeal.[5]

[4] The Court of Appeals' finding on direct appeal that counsel was not ineffective was limited to the failure to request the instruction. (Appx. 31a-32a)

The Opinion on Direct Appeal is Not Law of Case with Regard to the Issues in the Motion for Relief from Judgment

A "ground for relief" is different from "law of the case," which is "an amorphous concept." *Arizona v California*, 460 US 605, 618 (1983). "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues" in later stages of the same case. *Id.* Law of the case applies, however, only to issues actually decided in the prior appeal, *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000), and where there is no change in material facts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991). Law of the case "directs a court's discretion, it does not limit the tribunal's power." *Id.* Since the court below, and the prosecution, have applied a law of the case analysis, counsel addresses that issue as well. As will be clear, even under a law of the case analysis, the grounds for relief were not decided against Mr. Hewitt-El on direct appeal.

The law of the case doctrine does not apply for four reasons: 1) the Court of Appeals did not previously decide the specific issues raised herein; 2) the facts are materially different than the facts existing at the time of the opinion on direct appeal; 3) application of "law of the case" is discretionary, not mandatory; 4) where constitutional issues are involved, law of the case should not be applied.

1) **The Court of Appeals' decision on direct appeal did not specifically address the issues raised in this 6.500 motion.** Law of the case applies only to issues actually decided in

[5] Furthermore, both counsel abandoned the issues raised in the motion for relief from judgment. Where a claim is not included in the "Questions Presented" and/or where no authority is presented to support the claim, the courts consistently find that it has not been preserved and has been abandoned. See *City of Lansing v Hartsuff*, 213 Mich App 338, 351 (1995): "[W]e decline to review this issue. This issue was not preserved for appeal because it was not set forth in defendant's statement of the questions involved. MCR 7.212(C)(5)." See also *People v Yarbrough*, 183 Mich App 163, 165 (1990). In the direct appeal, the question presented by both defense counsel and the prosecutor in the first issue was whether the trial court erred in denying the motion for substitute counsel. The Court of Appeals found that the second issue was abandoned.

the prior appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000). The doctrine applies where the Court has specifically determined in a prior decision the *specific* question raised in the subsequent appeal. See *Poirier v Grand Blanc Twp*. (After Remand), 192 Mich App 539, 546 (1992); *People v Douglas* (On Remand), 191 Mich App 660, 662 (1991); *People v Peters*, 205 Mich App 312, 316 (1994), rev'd on other grounds, 449 Mich 515 (1995). For example, in *Vandenberg v Vandenberg*, 253 Mich App 658, 662- 663 (2002), the plaintiff appealed from the trial court's order granting summary disposition in favor of defendants on the ground that plaintiff's medical malpractice claim was barred by the statute of limitations. The Court of Appeals affirmed the trial court's order because the panel in *Vandenberg I* did not address the late filing of an affidavit of merit *in the context of* a statute of limitations defense and "the doctrine of law of the case did not preclude defendants from raising that argument on remand."

In the instant case, if part of the Court of Appeals' decision in the direct appeal can be considered a finding that there were no apparent alibi witnesses, this conclusion was made in the context of a *request for substitute counsel*, without testimony from the missing witnesses, and the holding was a determination that the *trial court did not err* in denying the request for substitute counsel on the eve of trial (for that and other reasons). By contrast, the trial court's determination in the present appeal was made in the context of ineffective assistance of counsel and the holding was that Mr. Hewitt-El had a substantial defense and that *trial counsel was ineffective* in failing to present his alibi and medical witnesses. As a corollary, original appellate counsel was also ineffective for failing to properly present a meritorious issue on appeal. The issues, quite simply, are not identical.

The Court of Appeals' determination in the direct appeal that the result would not have been different absent an instruction on use of prior convictions for impeachment was made in the context of a *curative instruction on admitted evidence* (prior convictions elicited by defense counsel and followed up by the prosecutor). By contrast, the trial court in granting relief from judgment determined that the result would likely have been different had the inadmissible prior armed robbery convictions been *suppressed* and this finding was made in the context of ineffective assistance of counsel for *failure to move for their suppression*. This issue the Court of Appeal expressly found was *abandoned* by counsel on direct appeal. The issue, therefore, was not addressed at all by the appellate court.

The "law of the case" in the direct appeal was that the trial court did not err in failing to appoint substitute counsel, that appellate counsel abandoned the claim that introduction of Mr. Hewitt's prior convictions was error, and that a curative instruction would not have been appropriate or outcome-determinative. The grounds for relief in the instant appeal are not the same.

2) **The facts involved in the two appeals are not the same.** Also critical in the analysis here is the fact that the motion for relief from judgment was decided after a lengthy evidentiary hearing, while the direct appeal was limited to the evidence already in the record. Application of "law of the case" applies only where "there has been no material change in the facts or intervening change in the law." *Michigan v Duncan*, *supra* at 189. *C.A.F. Investment Co. v. Saginaw Twp.*, 410 Mich 428, 454 (1981); *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991). As the Court stated in *Foreman v Foreman*, 266 Mich App 132, 138 (2005):

> The law of the case doctrine is discretionary and expresses the practice of the courts generally; it is not a limit on their power. The doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law.

See also *Reeves v Cincinnati, Inc*. (After Remand), 208 Mich App 556, 560 (1995).

In the instant case, there has been a material change in facts. Witnesses testified to an alibi for Mr. Hewitt-El; it was revealed that trial counsel eliminated Sheila Jackson based on an inexcusable mistake with regard to the time of the offense; trial counsel admitted that he failed to investigate the medical evidence or call the medical witnesses; trial counsel admitted that he did not move to suppress the prior convictions because of his belief that they would have to be admitted anyway; appellate counsel admitted that he did not investigate or move for an evidentiary hearing to support any ineffective assistance of counsel claims. (Appx. 136a; 153a; 114a; 118a; 137a; 145a; 35a). Law of the case cannot be applied where there has been such a material change in the facts.

3) **The law of the case doctrine is discretionary**, *Locricchio v Evening News Ass'n*, *supra* at 109, **and there are no circumstances calling for its application in this case**. In criminal cases, a trial court retains the power to grant a new trial at any time where "justice has not been done." MCL 770.1; see also *People v Johnson*, 397 Mich 686, 687 (1976), overruled on other grounds by *People v Hampton*, 407 Mich 354, 368 (1979) (standard for directed verdict). In *People v Wells*, 103 Mich App 455, 463 (1981), the Court stated that the law of the case doctrine is not inflexible and need not be applied to create injustice. "Therefore, unlike in standard civil proceedings, in criminal cases the law of the case doctrine does not automatically doom the defendant's arguments or automatically render them frivolous and worthy of sanctions." *People v Herrera*, 204 Mich App 333, 339-341 (1994). See also *People v Phillips*, 227 Mich App 28, 33 (1997) ("[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice.") Even if the grounds for relief were decided against Mr. Hewitt-El in the direct appeal, the law of the case doctrine should not

be mandatorily applied. To do so would create injustice in light of the substantial defenses of which Mr. Hewitt-El was deprived and in light of the denial of his right to effective assistance of counsel both at trial and during the direct appeal.

4) **Law of the case should not apply where, as in the instant case, the defendant's constitutional rights have been violated**. In *Locricchio, supra*, the Supreme Court concluded that the Court of Appeals "should not have relied upon the doctrine in declining a further, independent review of the case inasmuch as the constitutional rights of the parties were involved and those rights would be violated if a prior erroneous decision was allowed to stand under the doctrine." See *Bennett v Bennett*, 197 Mich App 497, 499–500 (1992). If the Court of Appeals' decisions are allowed to stand, Mr. Hewitt-El's Sixth and Fourteenth Amendment rights will remain violated.

The application of law of the case to preclude review of issues here mirrors the approach this Court rejected with respect to the related concept of collateral estoppel in *People v Trakhtenberg*, 493 Mich 38 (2012). As this Court explained in that case, collateral estoppel applies when (1) a question of fact "essential to the judgment was actually litigated and determined by a valid and final judgment;" (2) the same parties had a "full and fair opportunity to litigate the issue;" and (3) "there was mutuality of estoppel." Id. at 48. In *Trakhtenberg*, the prosecution argued that the finding in a civil case that trial counsel had not committed malpractice precluded his subsequent motion under 6.500 based on the ineffective assistance of counsel. In rejecting that argument, this Court stated that collateral estoppel "'must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims.'" Id. at 50 quoting *Storey v Meijer, Inc*, 431 Mich 368, 372 (1988). This Court held that collateral

estoppel should not apply because the defendant did not have a "full and fair opportunity to litigate his claim in the malpractice proceeding." *Id*.

The United States Supreme Court pointed out in *Schlup v Delo*, 513 US 298 (1995), that flexibility in applying principles of issue preclusion is particularly appropriate in the context of collateral review of criminal convictions:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata. Thus, for example, in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." Id., at 15-17, 83 S.Ct., at 1077-1078; see also *McCleskey [v. Zant*], 499 U.S. [467,] 495, 111 S.Ct., at 1471 [(1991)]. The *Sanders* Court applied this equitable exception even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 U.S., at 12-15, 83 S.Ct., at 1075-1077. *Id*., at 319-320.

Further, keeping in mind that this Court has indicated that the interpretation of 28 USC § 2255 is relevant to motions for relief from judgment, *Sanders* again is relevant. "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground." *Id*., at 16. Such an approach is entirely consistent with the nature of the post-conviction review process.

Conclusion

In in the instant case, because they advance differing legal bases for granting relief, the "grounds for relief" cited in Mr. Hewitt-El's Motion for Relief from Judgment - including the contention that trial counsel was ineffective for depriving Mr. Hewitt-El of witnesses is support of a substantial defense and that trial counsel failed to move for suppression of his client's prior armed robbery convictions - are legally distinct from the "grounds for relief" cited in his direct

appeal - including the contention that the trial court erred in denying Mr. Hewitt-El's motion for substitute counsel and that counsel was ineffective for failing to object to the prosecutor's cross examination and/or his failure to request an instruction. Because Mr. Hewitt-El's grounds for relief were not decided against him on direct appeal, relief is not foreclosed under MCR 6.508(D)(2).

II. THE COURT OF APPEALS FAILED TO DEFER TO THE WAYNE CIRCUIT COURT'S CREDIBILITY DETERMINATIONS.

Standard of Review

Factual findings are reviewed for clear error, and the clear error standard of review is *highly deferential* to the trial court. *People v Knight*, 473 Mich 324, 352 (2005).

Discussion

This Court has ordered briefing on the question of whether the Court of Appeals failed to defer to the Wayne Circuit Court's credibility determinations. The answer is yes. The Court of Appeals afforded little or no deference to the trial court.

The trial court ruled that there were witnesses who would have established an alibi for Mr. Hewitt-El, finding their testimony credible. With regard to Mark McCline, the trial court noted that he would have been willing to testify on Mr. Hewitt-El's behalf and that he told this to Sheila Jackson, who had called him more than once before trial. The judge further found that his testimony would have corroborated Ms. Jackson as well as Mr. Hewitt-El. (Appx. 15a). The trial judge found that trial counsel's assertion that he had done an adequate investigation was not credible; the judge found that, upon further questioning of Shelia Jackson and upon further investigation, trial counsel would have found the alibi witnesses. The trial court stated, "Counsel, in his haste to dismiss the credibility of Jackson's testimony, failed to conduct a reasonable investigation." (Appx. 16a). In support of this conclusion, the judge stated that,

"Counsel took the position that the putative witnesses would have to contact him. Counsel did not attempt to hire an investigator to locate the witnesses." (Appx. 14a). With regard to the medical witnesses, the trial court found trial counsel's assertion that the witnesses were irrelevant to the defense lacked credibility because, "Counsel failed to add objective facts to buttress Defendant's defense of physical impossibility." (Appx. 17a). The trial court found that, "While Defendant was not restricted from 'lifting his legs,' the record clearly established Defendant had a diminished range of motion due to his injuries." (Appx. 17a). With regard to the failure to move to suppress Mr. Hewitt-El's prior convictions, the trial court found incredible trial counsel's claim that Mr. Hewitt-El's convictions "would not have been suppressed as a consequence of Defendant's decision to testify in his own behalf." (Appx. 16a). Finally, the trial court concluded that Mr. Hewitt-El's complaints "stem from trial counsel's wholesale failure to advocate for Defendant's interests during trial." (Appx. 13a). The judge who evaluated the credibility of the witnesses at the evidentiary hearing was the same judge who heard the witnesses at trial. This judge found ineffective assistance of trial and appellate counsel, actual prejudice to Mr. Hewitt-El, and a reasonable likelihood of acquittal.

The Court of Appeals afforded no deference to the trial court's findings and undertook an *independent* credibility determination. The Court of Appeals made the conclusory statement that it agreed with the prosecutor that the trial court abused its discretion. (Appx. 23a). The Court of Appeals did not once mention deference to the trial court's findings, and did not once acknowledge that the trial court, who heard both the trial and the hearing, was in the best position to judge credibility. The courts have consistently deferred to the trial court judge's credibility determinations for that very reason. See *People v Burrell*, 417 Mich. 439, 448 (1983); *People v Cheatham*, 453 Mich 1, 29–30 (1996); *LaForest v Black*, 373 Mich 86, 93 (1964) ("The

trial judge heard the witnesses, observed their demeanor, and was in the best position to determine their credibility and to conclude what the facts in the case really were.") The Court of Appeals proceeded to make its own findings that "defendant cannot show trial counsel's performance fell below an objective standard of reasonableness" (Appx. 24a) and that "the errors would not have deprived defendant of a substantial defense." (Appx. 25a). In making its own independent judgment that counsel was not ineffective and that Mr. Hewitt-El was not prejudiced, the Court of Appeals decided that, in its opinion, all of trial counsel's excuses for failing to present a defense were credible, and that, in its opinion, Mr. Hewitt-El's alibi witnesses were incredible (Appx. 25a).

The Court of Appeals improperly usurped the factfinder's role by making its own factual findings and credibility determinations on appeal. For example, with regard to the medical witnesses, the Court of Appeals disregarded the trial court's finding that such testimony would have buttressed Mr. Hewitt-El's defense and failed to mention or consider the fact that the trial court was in the best position to make that determination. The Court of Appeals accepted as credible and reasonable[6] trial counsel's assertion at the hearing that Mr. Hewitt-El's physical condition had "no relevance," failing to see the blatant inconsistency between that assertion and the fact that, at trial, counsel questioned Mr. Hewitt-El *extensively* about his physical condition and argued that he could not have jumped out of the window and run away (as the perpetrators did, according to the complainant). (Appx.26a). Again, the Court of Appeals ignored the trial court's finding that the corroborating medical evidence would have made a difference in the outcome.

[6] What possible "strategy" would there be in failing to corroborate Mr. Hewitt-El-El's testimony on this issue, which was an important facet of the defense?

The trial court's factual findings should have been reviewed for clear error, and the clear error standard of review is *highly deferential* to the trial court. *People v Knight, supra*. Indeed, MCR 2.613(C) requires that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." See *People v McSwain*, 259 Mich App 654, 683 (2003). The standard, being highly deferential, does not "entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Beason v Beason*, 435 Mich 791, 803 (1990), quoting *Anderson v Bessemer City*, 470 US 564, 573-574 (1985). A finding is clearly erroneous only if, after review of the entire record, the Court is left with the definite and firm conviction that a mistake has been made. *Beason, supra* at 805.

The trial court's ultimate decision is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269 (2003). An abuse of discretion can be found only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v Williams*, 240 Mich App 316, 320 (2000). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken–Ziegler, Inc. v Waterbury Headers Corp*., 461 Mich 219, 227 (1999).

As this Court said in *Spalding v Spalding*, 355 Mich 382, 384-385 (1959):

> In view of the frequency with which cases are reaching this Court assailing the exercise of a trial court's discretion as an abuse thereof,

> we deem it pertinent to make certain observations with respect thereto in the interests of saving expense to the litigants and avoiding delay in reaching final adjudication on the merits. Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts.

Appellate reluctance to interfere with the grant of a new trial is soundly rooted in the proposition that "[t]he judge was 'there'[w]e were not." *Alder v Flint City Coach Lines Inc*, 364 Mich 29, 39 (1961); *People v Lemmon*, 456 Mich 625 (1998).

As discussed above, the Court of Appeals ignored the fact that Judge Morrow was present at both the trial and the evidentiary hearing; he heard and observed the witnesses and was therefore able to evaluate their credibility. It was the trial judge's determination that the jury should have heard the alibi witnesses and the medical witnesses, and that the jury should not have heard that Mr. Hewitt-El had five prior armed robbery convictions. That disputed issues of fact are for the jury is a fundamental tenet of our jurisprudence, *Rizzo v Kretschmer*, 389 Mich 363, 371-372 (1973). After hearing and evaluating three days of testimony, Judge Morrow found that trial counsel failed to protect his client's rights and denied Mr. Hewitt-El a fair trial. Neither this Court nor the Court of Appeals is able to say that there was "no justification or excuse" for that ruling. The Court of Appeals had no authority to substitute its judicial opinion for that of the trial court.

III. MR. HEWITT-EL HAS ESTABLISHED ENTITLEMENT TO RELIEF UNDER MCR 6.508(D).

Standard of Review

The Court reviews for an abuse of discretion the circuit court's decision to grant relief from judgment. See *People v Osaghae* (On Reconsideration), 460 Mich 529, 534 (1999). A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691 (2003). An abuse of discretion occurs only "when the trial court

chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269 (2003). Factual findings are reviewed for clear error, and the clear error standard of review is *highly deferential* to the trial court. See *People v Knight*, *supra*; *People v McSwain*, *supra*. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497–498 (2002). *People v Miller*, 482 Mich 540, 544 (2008)

Discussion

This Court ordered briefing on the issue of whether "the defendant has established entitlement to relief under MCR 6.508(D)." The answer is yes.

MCR 6.508(D) provides:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
>
> (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

The trial court found that trial counsel's ineffective assistance was prejudicial to Mr. Hewitt-El. Deficient performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694. The trial court found good cause for failing to raise this issue in his direct appeal because appellate counsel was ineffective, under the same *Strickland* standard. *Murray v Carrier*, *supra* at 488, 106 SCt at 2645; *People v Reed*, 449 Mich 375, 382 (1995). Appellate counsel was ineffective where clearly meritorious issues were not investigated or raised. *People v Brown*, 491 Mich 914 (2012). Finally, the trial court found actual prejudice and entitlement to relief under MCR 6.508(D)(b) in that, but for the many errors, Mr. Hewitt-El would have had a reasonably likely chance of acquittal. (Appx. 14a-17a). That conclusion is well-supported in the record. Mr. Hewitt-El has established entitlement to relief by showing a reasonable likelihood of acquittal.

The standard for ineffective assistance of counsel and the standard for relief under MCR 6.508(D) are essentially the same. The only difference is that, for ineffective assistance of counsel, the defendant must show reasonable probability of a "different outcome." There might be other possible "better" outcomes - such as a guilty by reason of mental insanity verdict or a verdict of guilty of a lesser offense - but, in most cases, the "better outcome" would be acquittal. There is no significant difference between "probably" and "likely"; they are synonyms. This Court has stated that in interpreting statutes or court rules, it is appropriate to "refer to dictionary definitions in the absence of an explicit definition in the text being interpreted." *People v Gursky*, 486 Mich 596, 608 n. 21 (2010). "Likely" is defined as "probable; having a greater-than-even chance of occurring." http://www.yourdictionary.com/likely. The Oxford Dictionary defines likely as "Such as well might happen or be true; probable." Probably is defined as "in all likelihood" or "most likely; presumably." http://www.yourdictionary.com/probably. The Oxford Dictionary defines probable as "Likely to happen or be the case." In fact, probable may be a higher standard than likely. "In terms of meaning, probably implies (in my opinion) a marginally greater sense of certainty, if only because likely carries a slightly greater sense that there may be some sort of caveat or condition applied to the outcome." https://www.quora.com/Whats-the-difference-between-probably-and-likely.

"Reasonably" modifies likely to lessen the burden. Reasonable is defined in the Merriam-Webster Dictionary as "moderate, fair; a reasonable chance." Reasonably is defined as "to a moderate or acceptable degree," "that which might fairly and properly be required." The "reasonably likely" standard does not require proof of innocence.

Reasonable likelihood of acquittal was the standard for ineffective assistance of counsel before the Supreme Court in *Strickland, supra*, clarified, following *Beasley v United States*, 491

F2d 687 (CA 6, 1974), that prejudice must be shown in addition to ineffectiveness of counsel. See *People v DeGraffenreid*, 19 Mich App 702 (1969); *People v Pickens*, 446 Mich 298, 313 (1994) (adopting the *Strickland* test). The Court in *DeGraffenreid* held that, in judging the probability of the defendant's acquittal upon a retrial, a court ought not to weigh its personal view of the defendant's guilt or innocence. *Id*. at 718. Thus, in the instant case, the Court of Appeals should not have considered its personal view of Mr. Hewitt-El's guilt.

The prosecutor and the Court of Appeals refer to the "overwhelming[7] evidence" of guilt when opining that there was no reasonable likelihood of acquittal in Mr. Hewitt-El's case. They are both myopically considering only the evidence at trial, which consisted of Mr. Lemmon's testimony. However, the standard is whether the evidence of guilt would have been overwhelming had the errors not occurred. The errors consist of the deprivation of alibi and other defense witnesses (leaving Mr. Hewitt-El with no defense other than his own uncorroborated testimony) and the introduction of numerous similar assaultive prior convictions (leading naturally to the conclusion that if he did it before (five times) he did it this time).[8] Had Mr. Hewitt-El's alibi been presented and had the medical witnesses been presented and had the prosecutor been prevented from introducing the unquestionably prejudicial prior armed robbery convictions and had trial counsel not introduced Mr. Hewitt-El's prior convictions himself, would the evidence of guilt have been overwhelming? The answer has to be "no."

[7] To "overwhelm" means to overpower or defeat *completely*. Oxford Dictionary.

[8] In addressing impermissible character evidence, this Court recently emphasized just how unfairly prejudicial such evidence can be. See *People v Denson*, 500 Mich 385 (2017) ("We have noted that other-acts evidence carries with it a high risk of confusion and misuse … When a 'defendant's subjective character [is used] as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence.'").

The jury may very likely have believed the defense in light of the fact that the *only* evidence against Mr. Hewitt-El was Mr. Lemon's testimony.[9] There was no DNA; there were no fingerprints; there was no ballistic evidence; there was no physical evidence; there was no cell phone location evidence; there were no corroborating witnesses; there were no eyewitnesses; there was no confession or admission; there was no video; there was no vehicle identification; there were no jail phone calls; there was no informant; there was no snitch. In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, as in the instant case, any error in the conduct of the trial is more harmful. *People v Douglas*, 496 Mich 557, 579 (2014). But for the errors preventing a meaningful defense, Mr. Hewitt-El "would have had a reasonably likely chance of acquittal."

The prosecutor suggests that this Court's decision in *People v Garrett*, 495 Mich 908 (2013) precludes relief. There is no merit to that argument. In *Garrett*, the trial court had denied the motion for relief from judgment and the Court of Appeals affirmed. In denying the application for leave to appeal, the majority of this Court found that one of the issues had been decided previously, and, as to the remaining issue, the Court was *deferring* to the decision of the trial court.

On the other hand, in *People v Brown*, *supra*, the trial court had denied the motion for relief from judgment, the Court of Appeals affirmed, and this Court remanded for a new trial because of ineffective assistance of counsel:

> The trial court erred in concluding that the defendant received the effective assistance of trial counsel. Counsel was ineffective for failing to specifically request the National Counsel on Alcoholism and Drug Dependence staff activity logs before trial, as those logs

[9] The testimony of Mr. Lemon would also have been less credible had the defense evidence been presented. As it was, his testimony contradicted what he told the responding police officer. He informed the officer that he told the perpetrators he did not have any money, but he later testified that he gave them $600.00. (Appx 249a).

> supported the defendant's claim that he did not have as many individual counseling sessions with the complainants as they alleged. Trial counsel was also ineffective for failing to effectively cross-examine the sole complainant (the "complainant") whose testimony resulted in the defendant's convictions. Counsel failed to point out any of the inconsistencies in the complainant's trial testimony, and also failed to develop the point that her trial testimony was inconsistent in some respects with her preliminary examination testimony and with her initial statement to the police. Because the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he has met the burden of establishing entitlement to relief under MCR 6.508(D).

The failures of counsel in the instant case are at least as egregious as those in *Brown*. Mr. Hewitt-El has likewise met his burden of establishing entitlement to relief.

Moreover, the Supreme Court has made it clear that the *Strickland* prejudice inquiry is inherently cumulative in nature. See *Strickland v Washington*, 466 US at 668 (1984) ("Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors"). In determining whether the trial was fundamentally unfair, the reviewing Court must look at the total, cumulative effect of all of counsel's deficiencies. See, e.g., *United States v Dado*, 759 F3d 550, 563 (CA6 2014) ("[T]he court must consider the cumulative effect of the alleged errors, since '[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'"). It would be improper for a reviewing court to separate ineffective assistance of trial counsel and other claims and dismiss them individually for failing to satisfy the prejudice inquiry.

The trial judge properly considered the cumulative effect of the errors in finding trial counsel's "wholesale failure to advocate for Defendant's interests during trial." (Appx. 13a). However, the Michigan Court of Appeals failed to consider the cumulative effect of the many errors that infected Mr. Hewitt-El's trial, including the failure to investigate and present witnesses to support his alibi defense, the failure to investigate and present witnesses in support of his medical defense, and allowing the admission of overwhelmingly prejudicial evidence of Mr. Hewitt-El's numerous prior similar convictions. Considering the cumulative effect of the many errors in this case, there was sufficient cumulative prejudice to merit granting the motion for relief from judgment. And again, the Court of Appeals failed to give any deference to the trial court.

Also, Mr. Hewitt-El has demonstrated cause and prejudice and entitlement to relief pursuant to this provision of MCR 6.508(D):

> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

In *People v Reed, supra*, this Court explained that this provision "recognizes that the most fundamental injustice is the conviction of an innocent person," *id*., at 378 n. 1, but did not further define it. The "procedural" or "gateway" actual innocence doctrine comes from the Supreme Court opinion in *Schlup v Delo, supra*. To satisfy the federal actual innocence standard, a defendant "must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *People v Swain, supra* at 638.

The Sixth Circuit summarized the standard as follows:

> "If a habeas petitioner 'presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through

> the gateway and argue the merits of his underlying claims.'" *Souter v Jones*, 395 F3d 577, 590 (CA 6, 2005) quoting *Schlup* at 316.

However, this standard does not require absolute certainty about the defendant's guilt or innocence. A finding of actual innocence is not the equivalent of a finding of not guilty by a jury or by a court in a bench trial. *Lambert v Blackwell*, 134 F3d 506, 509 (CA 3, 1997).

The Michigan rule is stated in terms of "significant possibility." "Possible" is defined as "being within the limits of ability, capacity, or realization." "Significant" is defined as "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." https://www.merriam-webster.com/dictionary. Based on this wording, the Michigan rule should be read as requiring a meaningful possibility that in fact the defendant did not commit the crime, and not the probability that no reasonable factfinder would find him guilty of that crime.[10]

Mr. Hewitt-El's position is that he does qualify for relief under this standard. When the evidence developed since his trial is factored in, there is more than a "significant possibility" that he is in fact innocent. Mr. McCline and Leon Hewitt-El both testified that Mr. Hewitt-El was at his home, working on their automobile sound systems, at the time of the crime, and Sheila Jackson would have corroborated their testimony. (Appx. 157a-160a; 64a-67a). Sheila Jackson could have testified that when she arrived home at the relevant hour, Mr. Hewitt-El was there. Mr. McCline was an impartial witness; he was not a friend or relative, only a business acquaintance. (Appx. 157a). There were some inconsistencies in their testimony, but that is to be expected after *six years* had elapsed. They were consistent on the important facts, and they remembered the date as it was Valentine's Day. The fact that at trial, Mr. Hewitt-El testified that he was alone while cooking dinner is not fatal to his defense. He actually *was* alone at that

[10] The federal standard is one of "probability," as *Schlup* makes clear – that "the constitutional violation 'probably has caused the conviction of one innocent of the crime.'" *Id.*, at 322 (quoting *McCleskey v Zant*, 499 US 467, 494 (1991)). On its face, "probably" - i.e., more likely than not - implies a greater degree of likelihood than "possibly," even as modified by "significant."

particular time; his son and Mr. McCline came later, as did Sheila Jackson.[11] Mr. Hewitt-El was prevented from presenting a complete and credible alibi by his attorney's failure to present his alibi witnesses. Mr. Hewitt-El's doctor and physical therapist both testified that Mr. Hewitt-El had been injured in an automobile accident and that his ability to walk was substantially impaired. (Appx. 86a-90a; 102a-107a). It would have been extremely difficult, if not impossible, for him to jump out of the window and run away, as the actual perpetrators did. As argued above, there was no evidence against him other than the testimony of the complainant. Under these circumstances, there is a "significant possibility" that he is in fact innocent.

For all the above reasons, Mr. Hewitt-El has established entitlement to relief under MCR 6.508(D).

[11] Had Mr. Hewitt-El been questioned further, the prosecutor would have argued he was making it up because he failed to bring in the witnesses to testify.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse the decision of the Court of Appeals and remand for a new trial consistent with the trial court's decision granting the Motion for Relief from Judgment.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Chari K. Grove

BY:_____

CHARI K. GROVE (P25812)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: December 14, 2017